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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

MICHAEL W. FRICKE
LIEUTENANT COMMANDER, SUPPLY CORPS, U.S NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether general court-martial convening authorities have the unfettered power to refer an otherwise capital case as noncapital under the Uniform Code of Military Justice?

Whether the convening authority's noncapital referral in this case usurped Congress' legislative authority to prescribe the sentencing authority of courts-martial?

Whether Petitioner's general court-martial had jurisdiction to try him for premeditated murder where the case had not been *previously* referred to trial as noncapital case?

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Lieutenant Commander Michael W. Fricke, Supply Corps, United States Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, published at 53 M.J. 149 (2000), may be

found at Appendix A., *infra,* at 1a-20a. The opinion of the Navy-Marine Corps Court of Criminal Appeals, published at 48 M.J. 547 (1998), may be found at Appendix B, *infra* at 21a-30a.

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on July 5, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 14 of the U.S. Constitution reads, in relevant part:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces. . . .

STATUTORY PROVISIONS

Article 18, Uniform Code of Military Justice, [hereinafter UCMJ], 10 U.S.C. § 818, reads in relevant part:

> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. [. . .] *However, a general*

> *court-martial of the kind specified in section 816(1)(B)*[1] *shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.*

(emphasis and underscoring added).

Article 45(b) UCMJ, 10 U.S.C. § 845(b) reads in relevant part:

> A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. [...]

Article 49(f) UCMJ, 10 U.S.C. § 849(f) reads in its entirety:

> Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

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[1] Consisting of only of a military judge.

STATEMENT OF THE CASE

On February 5, 1994, the convening authority referred a charge of premeditated murder[2] to trial before a general court-martial. The maximum authorized punishment for premeditated murder was death. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereafter MCM (1995 ed.)], Part IV, ¶ 43.e.(1). Life imprisonment was the mandatory minimum punishment. *Id.* The charges were referred to trial without any special instructions, thereby making the case capital.[3] The military judge and trial defense counsel were notified of the aggravating factors the Government intended to prove pursuant to RULE FOR COURTS-MARTIAL [hereafter R.C.M.] 1004, MCM (1995 ed.). Record at 2, 141; Appellate Exhibit I.

On August 16, 1994, the court-martial of officer members[4] and military judge was assembled and sworn. Record at 370. On August 17, 1994, trial commenced and the Government called its first witnesses. Record at 619 *et seq.*

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[2] Article 118(1), UCMJ, 10 U.S.C. § 918(1)

[3] *See United States v. Clark*, 35 M.J. 432 n.1 (C.M.A. 1992) ("The charge sheet reflects 'None' in the section for 'instructions.' In a capital case this means the referral is capital.")

[4] In military practice, the members decide guilt or innocence much like a civilian jury. Unlike a civilian jury, however, members are handpicked to be the "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). Members, unlike juries, have the right to call and question witnesses, Art. 46, UCMJ, 10 U.S.C. § 846. Members also are responsible for adjudging an appropriate sentence. Art. 51(a), UCMJ, 10 U.S.C. § 851.

On August 26, 1994, the defense and convening authority entered into an agreement in which the Petitioner agreed to enter a plea of guilty and waive his right to a trial and sentencing by members in return for the government withdrawing the capital referral of the case. Record at 1391-92; Appellate Exhibit CCXII at 3. If Petitioner failed to comply with any of the terms of the pretrial agreement, his pleas of guilty would be withdrawn and the capital trial would resume. Record at 1392; Appellate Exhibit CCXII at 2.

The military judge then excused the members from the courtroom. Record at 1388-89. The military judge re-advised Petitioner of his rights and Petitioner elected trial by military judge alone pursuant to the pretrial agreement. Record at 1394. Petitioner then entered his plea of guilty to premeditated murder pursuant to the pretrial agreement. Record at 1391-1424. The military judge accepted his pleas and entered a finding of guilty. Record at 1423. The members were dismissed on August 29, 1994. Record at 1425.

On August 30, 1994, Petitioner was sentenced by the military judge to a dismissal from the naval service, confinement for life, total forfeiture of all pay and allowances, and a fine of $100,000. Record at 1444. On June 11, 1995, the convening authority approved the sentence and, except for the dismissal, ordered it executed. Pursuant to the agreement, the convening authority suspended all confinement in excess of 30 years, as well as the forfeiture of all pay and allowances, for a period of 10 years from the date of trial.

The record of trial was forwarded to the Navy-Marine Corps Court of Criminal Appeals for review pursuant to Art. 66, UCMJ, 10 U.S.C. § 866. On March 10, 1998 the Navy-

Marine Corps Court issued its decision affirming the findings and sentence as adjudged. *United States v. Fricke*, 48 M.J. 547 (N.M.Ct.Crim.App. 1998).

On June 4, 1999, the U.S. Court of Appeals for the Armed Forces granted Petitioner's petition for grant of review, pursuant to Art. 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3), on two issues.[5] On July 5, 2000 the Court of Appeals affirmed the Navy-Marine Corps Court's decision as to the findings of guilt but set aside its decision as to sentence and ordered an evidentiary hearing as to matters relating to a claim of unlawful pretrial punishment. *United States v. Fricke*, 53 M.J. 149 (2000).

Before the Court of Appeals, Petitioner argued that his military judge-alone court-martial had no jurisdiction under Art. 18, UCMJ, to try him, and his pleas of guilty were unlawful under Art. 45(b), UCMJ, because the case had not been *previously* referred to trial as a noncapital case and the convening authority's purported "withdrawal" of the capital referral was contingent upon Petitioner's complying with the terms of the pretrial agreement. *Id.* at 153. The Court of

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[5] I. Whether the Navy-Marine Corps Court of Criminal Appeals erred in finding that appellant is not entitled to additional administrative time credit for having been illegally confined prior to trial, and additional administrative time credit for having been subjected to unlawful pretrial punishment in violation of Articles 13 and 55, UCMJ.

II. Whether the Navy-Marine Corps Court of Criminal Appeals erred in finding that appellant's guilty plea is not void in violation of article 45, UCMJ, in that appellant pleaded guilty to a capital offense and the general court-martial of the kind specified in 10 U.S.C. section 816(1)(b) was without jurisdiction to convict appellant based upon this improvident plea.

Appeals rejected these defects as "technical in nature" and noted that the military judge acknowledged the noncapital referral on the record. *Id.* at 154.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because:

- The Court of Appeals, by sanctioning a general court-martial convening authority's unfettered power to restrict the sentencing authority of a general court-martial to adjudge a sentence of death in an otherwise capital case, has so far departed from the uniform system of military justice prescribed by Congress as to call for an exercise of this Court's supervisory powers;

- The Court of Appeals has decided an important question involving the power of a general court-martial convening authority to limit the sentencing authority of general courts-martial in a capital case in a manner contrary to the Constitution's separation of powers scheme and which conflicts with relevant decisions of this Court, including *United States v. Loving*, 517 U.S. 748 (1996); and

- The Court of Appeals' construction of the jurisdiction of a general court-martial consisting of a military judge alone under Art. 18, UCMJ, as amended by the Military Justice Act of 1968, is an important question of federal law which has not been, but should be, settled by this Court because it will affect the disposition of every court-martial involving a capital offense.[6]

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[6] Art. 85 (desertion in war), Art. 94 (mutiny and sedition), Art. 99

ARGUMENT

A court-martial "is a mere creature of the statute. . . and must be created under its provisions." *McClaughry v. Deming*, 186 U.S. 49, 64 (1902). This Court has long held that "unless facts essential to sustain [a court-martial's] jurisdiction appear, it must be held not to exist." *Collins v. McDonald*, 258 U.S. 416, 418 (1922).

As part of the Military Justice Act of 1968, Congress amended Article 18, UCMJ, to provide that "a general court-martial [consisting of a military judge alone] shall not have *jurisdiction* to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." Military Justice Act of 1968, Pub.L. 90-632, 82 Stat. 1335 (1968) *reprinted in* 1968 U.S.C.C.A.N. 1561 (emphasis added).

Nevertheless the Court of Appeals for the Armed Forces interpreted this jurisdictional limitation as a mere technicality which does not preclude a general court-martial convening authority from withdrawing and re-referring a capital case as noncapital, contingent upon an accused entering into a pretrial agreement to plead guilty and be sentenced by a military judge alone. *United States v. Fricke*, 53 M.J. at 153-154.

(misbehavior before the enemy), Art. 100 (subordinate compelling surrender), Art. 101 (improper use of a countersign), Art. 102 (forcing a safeguard), Art. 104 (aiding the enemy), 106 (spies), 106a (espionage), 110 (willfully hazarding a vessel), 113 (misbehavior of a sentinel during war), 118 (premeditated and "felony" murder), and 120 (rape), UCMJ, 10 U.S.C. §§ 885, 894, 899-902, 904, 906, 906a, 910, 913, 918 and 920.

The Court of Appeals' decision is wrong and must be reversed by this Court because:

A. It gives to general court-martial convening authorities the unfettered discretion to refer an otherwise capital offense as noncapital despite the absence of any statutory authority or legislative history to support such a broad exercise of power.

B. It violates the Constitution's separation of powers scheme by usurping Congress' legislative authority to define the sentencing power of a general court-martial and giving it to career military officers to exercise, on a case-by-case basis, without any intelligible principles to follow; and

C. It interprets the 1968 amendments to Art. 18, UCMJ, in a manner contrary to the plain language and legislative intent of Congress that a military accused not be placed in the position of waiving his right to a trial before members in order to avoid the death penalty.

For these reasons Petitioner's court-martial, consisting of a military judge alone, was without jurisdiction to try and sentence him for an "offense for which the death penalty may be adjudged" because the case was not, and constitutionally and statutorily could not, be referred to trial as a noncapital case under the circumstances of this case.

A.

General court-martial convening authorities do not have the authority to refer an otherwise capital offense of premeditated murder as noncapital in order to confer jurisdiction on a court-martial consisting of a military judge alone.

In military practice the prosecution of courts-martial begins when a convening authority, typically a senior military officer in the accused's chain-of-command, appoints or "convenes" a court-martial by selecting a panel of officers and then "refers" charges to that panel of officers for trial. *See* R.C.M. 504 and 601, MCM (1995 ed.). A military judge is then "detailed" pursuant to regulations of the service secretary. R.C.M. 503(b)(1), MCM (1995 ed.). In a noncapital case, the accused may request a bench trial before the military judge alone. Art. 16(1)(b), UCMJ, 10 U.S.C. § 816(1)(b).

For offenses for which the death penalty may be adjudged, however, a court-martial consisting of a military judge alone does not have jurisdiction to try the accused unless the charges have been previously referred as noncapital. Art. 18, UCMJ. Nor may an accused plead guilty to a capital offense, *i.e.* "an offense for which the death penalty may be adjudged." Art. 45(b), UCMJ.

The Court of Appeals, in dismissing the defects in the purported noncapital referral as merely "technical in nature" assumed, *a priori*, that the convening authority in this case had the legal power to refer the case as noncapital. *United States v. Fricke,* 53 M.J. at 153-154. Yet the Court of

Appeals' decision does not cite any statutory authority for such a proposition.

The Court of Appeals' failure to cite such authority is critical because, if the convening authority did not have the legal power to refer the charges as noncapital, then Petitioner's court-martial consisting of a military judge alone was without jurisdiction to try him under the plain language of Art. 18, UCMJ.

The explanation for this "oversight" is quite simple. Congress has never given convening authorities such unfettered power. Yet, for over 40 years, the Court of Appeals for the Armed Forces has, through judicial *fiat*, recognized and acquiesced in general court-martial convening authorities' exercise of this unrestrained power to refer otherwise capital offenses as "noncapital" and thereby preclude general courts-martial from adjudging an otherwise lawful sentence to death.

Historically, courts-martial have had wide discretion in deciding what sentence to adjudge in a general court-martial and were subject only to the limits imposed by the Constitution, Congress, and the President. William Winthrop, MILITARY LAW AND PRECEDENTS at 395-400 (2d ed. rev. 1920). It was not until 1890 that Congress gave the President authority to set maximum limits. *Id.* The convening authority's power to affect the sentence has, in contrast, always been reserved until after the trial. *Id.* at 447-448.

Prior to 1948 "there was no provision in the law for the treatment of a capital case as not capital by reason of the

appointing authority directing, before trial by general court-martial, that it be so treated." BULLETIN OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, IX(2), §382 at 76 (1950).

In 1948 Congress amended Article 25 of the Army's Articles of War [hereafter "A.W. 25"] to permit the Government to take and admit depositions in cases involving capital offenses, provided the charges were referred as noncapital prior to trial. Act of June 4, 1920, 41 Stat. 792 *amended by* Selective Service Act of 1948, Pub.L. 759, 62 Stat. 631 (1948).

Following the enactment of the UCMJ in 1950, only Art. 49(f) made reference to noncapital referrals. 50 U.S.C. § 624(f) *recodified at* 10 U.S.C. § 849(f). Art. 49(f), UCMJ, provided for the admission of depositions in capital cases "whenever the convening authority directs that the case be treated as not capital," and was taken directly from A.W. 25. Uniform Code of Military Justice: Hearings on H.R. 2498 Before a House Subcommittee of the Committee on Armed Forces, 81st Cong., 1st Sess. at 1064-1065 (1949) in INDEX AND LEGISLATIVE HISTORY UNIFORM CODE OF MILITARY JUSTICE (U.S. Government Printing Office, Washington D.C., 1950) [hereafter "House Hearings"]. Thus under the Code, Congress continued to authorize noncapital referrals of capital offenses only where the Government's proof would fail were it unable to use depositions. *Id.*

Nothing in the legislative history of the UCMJ suggests that Congress intended to give to individual convening authorities the unfettered power to decide whether an otherwise capital offense would be tried as "noncapital."

See e.g. House Hearings at 820, 1056-1057 (discussing Art. 45, UCMJ, and the circumstances under which an accused might plead guilty to a lesser-included noncapital offense or to a capital offense referred to a special court-martial.[7]).

Nor is a general power to refer cases as noncapital suggested in any other article of the UCMJ. Prior to trial the convening authority's only considerations are whether the specification states an offense, whether the evidence warrants the specification, and whether a court-martial would have jurisdiction over the accused and the offense. Art. 34, UCMJ, 10 U.S.C. § 834. The only means Congress gave convening authorities to limit the sentencing discretion of courts-martial members was through deciding which charges to refer to trial and the type of court-martial to which they are referred. In contrast Congress gave convening authorities virtually unlimited discretion, *after trial*, to approve or disapprove all or part of the findings and sentence. Art. 60(c), UCMJ, 10 U.S.C. § 860(c).

Congress intended that, subject to the jurisdictional limits of the particular type of court-martial, and the President's maximum sentence limitations under Art. 56, UCMJ, a general court-martial would be free to adjudge any lawful punishment it saw fit. *See* Art. 18, UCMJ ("general courts-martial ... may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.") *Cf.* Art. 37, UCMJ, 10 U.S.C. § 837 ("No person subject to this chapter

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[7] Death is not an authorized punishment at a special court-martial. Art. 19, UCMJ, 10 U.S.C. § 819.

may attempt to coerce or, by any unauthorized means, influence the action of a court-martial...in reaching the...sentence in any case..." except for instructional or informational courses and statements and instructions given in open court.)

After adoption of the UCMJ, the President promulgated the first Manual for Courts-Martial implementing the code and expressing his clear understanding that the limited scope of a convening authority's power to refer a case as noncapital had not changed from pre-Code practice:

> Although capital under one of the articles cited, an offense is not capital if the applicable maximum limit of punishment prescribed by the President under Article 56 is less than death (127*c*); *or, in any case in which the death penalty is not mandatory but is authorized by law whenever the authority competent to convene a court-martial for a capital case has directed that the case be treated as not capital pursuant to Article 49 (145a)*. . . .

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), ¶ 15*a*(3) (emphasis added).

The earliest military appellate decisions similarly found the power to refer a case as noncapital to be restricted to circumstances in which the Government needed to use depositions. *See e.g. United States v. Patrick*, 5 C.M.R. 288, 289 (A.B.R. 1952) ("The Uniform Code of Military Justice

and the Manual for Courts-Martial, 1951, apparently contain no specific provisions relating to the treating of otherwise capital offenses as not capital, in order that a plea of guilty thereto may be accepted.") *See also United States v. Anderten*, 15 C.M.R. 354 (C.M.A. 1954); *United States v. Bancroft*, 11 C.M.R 3, 9-11 (C.M.A. 1953).

Then, in 1959, the Court of Military Appeals[8] upheld the Air Force Board of Review's decision affirming the conviction in *United States v. Wheeler*, 27 C.M.R. 981, 995 n.23 (A.F.B.R. 1959) *aff'd* 28 C.M.R. 212, 214 (C.M.A. 1959). In *Wheeler* the Court of Military Appeals rejected the appellant's collateral attack on his pleas of guilty to premeditated murder as contrary to Art. 45(b), UCMJ, noting "parenthetically that in view of the convening authority's directive [that the case be treated as not capital], the death penalty otherwise imposable upon conviction for premeditated murder could not be adjudged." *Id.* The Court of Military Appeals cited no statutory basis for this conclusion and none of the cases cited by either the Air Force Board of Review or Court of Military Appeals in their respective decisions support that proposition. *Id.* at 995, n.23; 28 C.M.R. at 214[9]

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[8] In 1994 the Court of Military Appeals' name changed to United States Court of Appeals for the Armed Forces. Act of Oct. 5, 1994, Pub.L. 103-337, Div A, Title IX, Subtitle C, § 924(c), 108 Stat. 2831, 2832.

[9] The Court of Military Appeals' decision in *Wheeler* relies exclusively upon *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957). In *McFarlane* the appellant's sentence to death for felony murder was set aside because of the defense counsel's failure to adequately prepare and contest the government's case. *Id.* at 324. The Court of Military Appeals found the defense counsel's conduct was tantamount to a guilty plea to a

Nevertheless, this "parenthetical" aside in *Wheeler* has become the lodestar for the proposition that convening authorities have the unfettered discretion to refer otherwise capital cases as noncapital. *See e.g. United States v. Fricke,* 48 M.J. 547, 549 (N.M.Ct.Crim.App. 1998); *United States v. Snodgrass,* 37 M.J. 844, 846 (A.F.C.M.R. 1993); *United States v. Dock*, 26 M.J. 620, 622 (A.C.M.R. 1988); *United States v. Rahn,* 33 C.M.R. 945, 947 n.1 (A.F.B.R. 1963); *United States v. Weaver*, 31 C.M.R. 662, 665 (A.F.B.R. 1961) *pet. rev. denied.* 31 C.M.R. 314 (C.M.A. 1961). *See also* DIGEST OF OPINIONS, Vol. 11 at 98 (The Judge Advocates General of the Armed Forces, 1961-1962) ("The convening authority's granting of a request that a charge of premeditated murder be treated a noncapital is sufficient consideration of the accused's agreement to plead guilty to the offense...." citing *Wheeler.*).

In 1968 Congress amended the UCMJ to create the office of "military judge." Military Justice Act of 1968, Pub.L. 90-632, 82 Stat. 1335 (1968) *reprinted in* 1968 U.S.C.C.A.N. 1561 (*codified* at Art. 26, UCMJ, 10 U.S.C. § 826). Congress also amended the Code to provide for trial by "general courts-martial consisting of ...only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves...." *Id.* (*codified* Art. 16(1)(B), UCMJ,10 U.S.C. § 816(1)(B)).

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capital offense in violation of Art. 45(b), UCMJ. *Id.* Thus the *McFarlane* case has nothing to do with noncapital referrals.

Finally, Congress amended Art. 18, UCMJ, to provide that a general court-martial, composed of a military judge alone, would "not have *jurisdiction* to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." Military Justice Act of 1968, Pub.L. 90-632, 82 Stat. 1335 (1968) *reprinted in* 1968 U.S.C.C.A.N. 1561-62 (emphasis added).

The legislative history of the amendment states that this amendment was "intended to avoid the type of choice found objectionable by the U.S. Supreme Court in United States v. Jackson 88 S.Ct. 1209, 390 U.S. 570, 20 L.Ed.23d 138 (1968), which invalidated a provision in the Federal Kidnapping Act that only the jury could impose a death penalty, on the theory that this provision impaired free exercise of the right to a jury trial." Military Justice Act of 1968, S. REP. NO. 90-1601 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505.

Nowhere in the extensive legislative history to the Military Justice Act of 1968 is there any indication that Congress intended to give convening authorities unfettered discretion to refer otherwise capital cases as noncapital in order to facilitate guilty pleas and pretrial agreements. *Id.* at 4501 *et seq.* Rather, the focus of the 1968 act was "to increase the participation of law officers [military judges] and counsel on courts-martial," *i.e.* the creation of a trial judiciary and expansion of the right of an accused to a qualified defense counsel. *Id.*

In *United States v. Stinson*, 34 M.J. 233 (C.M.A.

1992), the Court of Military Appeals considered the issue of whether a general court-martial composed of a military judge alone had jurisdiction to try an accused for an otherwise capital offense in light of the amendment to Art. 18, UCMJ. In holding that it did, the *only* authority cited by the Court of Military Appeals for the proposition that "a convening authority may direct trial of a capital offense as noncapital unless the death penalty is mandatory," was the nonbinding discussion following R.C.M. 601(e)(1). *Id.* at 238.

The Court of Appeals, in its decision below, does not even take up the question of whether the convening authority had the power to refer Petitioner's case noncapital. *United States v. Fricke*, 53 M.J. at 153-154. Rather, the Court of Appeals relies upon an *a priori* assumption that the convening authority had such power and restricts its discussion to the technical nature in which he is required to exercise it. *Id.*

Despite over 40 years of Court of Military Appeals-Court of Appeals for the Armed Forces decisions to the contrary, the emperor continues to have no clothes. Convening authorities have no statutory authority to support their broad exercise of discretion in referring otherwise capital cases as noncapital under the UCMJ.

The convening authority's purported noncapital referral in this case was *ultra vires* and the maximum punishment for Petitioner's charged offense remained death. Consequently the military judge had no jurisdiction to accept the Petitioner's pleas, enter findings of guilty, or adjudge a sentence under Art. 18, UCMJ.

B.

The convening authority's noncapital referral in this case violates the Constitution's separation of powers scheme by usurping Congress' legislative authority to prescribe the sentencing authority of courts-martial.

When a general court-martial convening authority refers an otherwise capital offense to trial as a noncapital case, he imposes a limit on the discretion of the court-martial to adjudge the death penalty. The power to define and limit punishments for military offenses is a legislative function reserved to Congress. *United States v. Loving*, 517 U.S. at 768-69.

Congress may expressly delegate the responsibility to more precisely define the limits of appropriate punishments for military offenses. *Id.* In doing so, however, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 771-772 quoting *Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Congress has expressly delegated to convening authorities only a very narrow authority to refer cases as noncapital when necessary to secure the admission of deposition testimony. Art. 49(f), UCMJ. Since this case did not involve a need to admit deposition testimony, the delegation of authority under Art. 49(f), UCMJ cannot form the basis for the convening authority's purported noncapital referral.

The specific language of Art. 49(f), UCMJ, calls into

play the maxim of statutory construction *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). *Raleigh & Gaston R. Co. v. Reid*, 80 U.S. 269, 270 (1872). *See* generally 2A SUTHERLAND STAT. CONST. § 47.23-25 (Singer 5th ed. 1992 Revision). Where Congress has limited the authority to refer cases as noncapital to the circumstances of Art. 49(f), it must be inferred that it excluded such authority under any other circumstances.

Even if the language and legislative history of the Code did suggest a broader discretion to make noncapital referrals, neither Congress nor the President has provided convening authorities with an intelligible principle to follow. Admittedly the Manual for Courts-Martial's "non-binding"[10] discussion does state that "[w]hen a convening authority has discretion to refer a capital case as noncapital, the convening authority should be guided by the criteria for adjudging capital punishment found at R.C.M. 1004." R.C.M. 601(e)(2) Discussion, MCM (1995 ed.). This case, however, demonstrates the "non-binding" characteristic of the discussion. Here the convening authority's decision to re-refer the case as noncapital was not guided by the criteria in R.C.M. 1004, *i.e.* a balancing of aggravating and mitigating factors. Instead it was driven by a pretrial agreement designed to secure Petitioner's guilty pleas and waiver of the right to a trial by members.

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[10] *See* MCM (1995 ed.), Part I, Preamble at I-1 (Manual's discussion sections do not constitute the official views of any Government department or agency; do not create rights or responsibilities that are binding on any person, party, or other entity; and failure to comply with it does not, of itself, constitute error.)

Moreover, the general court-martial convening authority in this case was a career military officer. Record at 2. A military commander's training, primary duties, typically brief period of tenure in command, and limited exposure to cases involving capital offenses make him (or her) particularly unsuited to the task of determining what range of punishments ought to be considered by a court-martial.[11] Unlike the President, convening authorities do not possess inherent authority over the administration of military justice under the Constitution. *Cf. United States v. Loving*, 547 U.S. at 772-73. Therefore any such delegation of legislative authority to them would require *explicit* guidance on how and when general court-martial convening authorities could refer a case as noncapital. *Id.* at 773. Such guidance simply does not exist.

Congress has delegated to the President the power to set uniform maximum punishments under Articles 18, 36, and 56, UCMJ. *United States v. Loving*, 517 U.S. at 769-71. Nowhere in the language of those articles, however, has Congress expressly assigned to the President the power to limit a court-martial's authority to adjudge a death penalty in

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[11] Given Congress' goal of establishing a "uniform" system of justice, it would be remarkably inconsistent to vest the unfettered discretion to decide whether a referral will be capital or noncapital in every one of literally hundreds of flag and general officers, as well as commanding officers of lesser rank, in every armed force scattered around the world. Art. 22, UCMJ, 10 U.S.C. § 822. In the federal criminal justice system, in contrast, there is a centralized review of every indictment that seeks to charge a capital offense. *See United States v. Cooper*, 91 F.Supp.2d 90, 113 (D.D.C. 2000) (Attorney General has the responsibility to decide in which cases the United States will seek the death penalty).

an otherwise capital case on a *case-by-case* basis. Such a delegation of Congress' legislative authority, even assuming it did exist, could not be further sub-delegated absent specific Congressional intent to permit such a sub-delegation. *See Touby v. United States*, 500 U.S. 160, 169 (1991); *United States v. Giordano*, 416 U.S. 505, 512-514 (1974).

Support for the position that Congress did not delegate its authority to establish maximum punishments is far more persuasive. Congress clearly intended that the President *personally* exercise his authority to make rules and limit maximum punishments in order to promote uniformity within and among the Armed Forces. *See* House Hearings 757, 1088-1089; *United States v. Morlan*, 24 C.M.R. 390, 394-395 (A.B.R. 1957). Allowing general court-martial convening authorities the unfettered discretion to use noncapital referrals to decide, *on a case-by-case basis*, whether a general court-martial will have the authority to impose the death sentence would undermine the uniform treatment of the most serious offenses under the Code. It would also be contrary to Congress' mandate in Art. 36(b), UCMJ, that "all rules and regulations made under this article shall be uniform insofar as practical." 10 U.S.C. § 836(b).

The convening authority's purported noncapital referral in this case was unconstitutional and the maximum punishment for Petitioner's charged offense remained death. Consequently the military judge had no jurisdiction to accept the Petitioner's pleas, enter findings of guilty, or adjudge a sentence under Art. 18, UCMJ.

C.

The Court of Appeals erred in deciding Petitioner's general court-martial, composed of a military judge alone, had jurisdiction to try him for premeditated murder, an offense for which the death penalty may be adjudged, where the case was not *previously* referred to trial as a noncapital case as required by Article 18, UCMJ, 10 U.S.C. § 818.

Even assuming some shred of evidence that Congress had given a broad grant of authority to general courts-martial convening authorities to refer cases as noncapital, the Court of Appeals' interpretation of the 1968 amendments to Art. 18, UCMJ is contrary to the plain language and legislative intent of Congress that a military accused may not waive a trial by a court-martial composed of members while under the threat of a death penalty.

The legislative history of the 1968 amendment to Art. 18, UCMJ, states that it was:

> [I]ntended to avoid the type of choice found objectionable by the U.S. Supreme Court in United States v. Jackson 88 S.Ct. 1209, 390 U.S. 570, 20 L.Ed.23d 138 (1968), which invalidated a provision in the Federal Kidnapping Act that only the jury could impose a death penalty, on the theory that this provision impaired free exercise of the right to a jury trial. The section provides that the jurisdiction of a military judge sitting alone is limited to cases rendered non-capital before

reference to trial.

Military Justice Act of 1968, S. REP. NO. 90-1601 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505.

In *Jackson*, this Court was called upon to decide the constitutionality of the Federal Kidnapping Act, which at the time provided in relevant part that interstate kidnappers "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend...." 18 U.S.C. § 1201(a) (1966).

The Kidnapping Act, however, did not provide for the imposition of capital punishment in the event a defendant waived his right to a jury trial and was sentenced by a federal judge. *United States v. Jackson,* 390 U.S. at 570. Moreover, if a defendant pled guilty then, by operation of statute, he would be sentenced by a judge without a jury and a death sentence could not be imposed. *Id.* at 576-577.

This Court found the Kidnapping Act to be unconstitutional because it imposed an impermissible burden upon the exercise of a defendant's right to demand a trial by jury. *United States v. Jackson*, 390 U.S. at 572 ("the defendant's assertion to the right to a jury trial may cost him his life...") and 581-82.

Consequently the language Congress added to Art. 18, UCMJ, requiring the noncapital referral to have "been *previously* referred to trial as a noncapital case" can only be read as meaning referred prior to the accused being required to elect the composition of his court-martial and enter pleas. The legislative history's use of the phrase "rendered

noncapital before reference to trial," plainly indicates that, before a military accused must decide whether to waive his right to a trial before members, he must no longer be subject to the threat of the death penalty. *See also* HOUSE COMM. ON THE ARMED SERVICES, 90TH CONG. REPORT ON INCREASING THE PARTICIPATION OF LAW OFFICERS IN COURTS-MARTIAL, H.R. REP. NO. 90-1481 at 5 (1968); 114 CONG. REC. S12,029 (October 3, 1968).

In this case, however, the case was referred capital and remained capital throughout the negotiation of the pretrial agreement. Even the purported withdrawal of the capital referral and "noncapital" re-referral was conditioned on Petitioner's pleading guilty and otherwise complying with the pretrial agreement. Record at 1392. There is no authority in the Code or its legislative history sanctioning a "conditional" noncapital referral in return for a guilty plea to a capital offense.[12] Congress has never amended Art. 45(b) to expressly permit guilty pleas if charges were rendered noncapital, even though it amended Art. 45(b) to permit the entry of findings to guilty pleas to noncapital offenses

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[12] The Air Force Court of Criminal Appeals appears to have been the only military court to actually consider the implications of a "contingent" noncapital referral. *United States v. Snodgrass*, 37 M.J. 844 (A.F.C.M.R. 1993). There, the court was tasked with resolving whether such a pretrial agreement violated Art. 45(b), UCMJ. *Id.* at 846-847. The court concluded that procedural violation, i.e. the failure to previously refer the case as noncapital, did not constitute prejudicial error in terms of Art. 45(b) because there was no doubt among the parties that the military judge would not impose the death penalty. *Id.* at 847. *Snodgrass*, however, did not address the jurisdictional defect arising out of Art. 18, UCMJ.

without a formal vote by members. Military Justice Act of 1968, H.R. REP. NO. 90-1481 at 9. There is simply no basis to conclude that Congress ever intended to authorize conditional "noncapital" referrals as a mechanism to secure guilty pleas in capital cases.[13]

Nevertheless, the President has promulgated R.C.M. 705(b)(2)(B), MCM (1995 ed.) expressly authorizing convening authorities to trade noncapital referrals for pleas of guilty. R.C.M. 705(b)(2)(B) is a new provision first published in the 1984 edition of the Manual for Courts-Martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984, *Analysis of Rules for Courts-Martial*, App. 21 at A21-35. In light of the plain language added to Art. 18, UCMJ, there is simply no authority for the proposition that R.C.M. 705(b)(2)(B) is a lawful exercise of the President's rule-making power.[14]

The plain language and history of the 1968 amend-

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[13] Agreements to plead guilty to avoid a possible death sentence have subsequently been upheld as constitutional. *See e.g. Brady v. United States*, 397 U.S. 742, 755 (1970); *United States v. Straight*, 42 M.J. 244, 247 (1995). Congress, however, has historically accorded military members greater protection from prosecutorial overreaching. *See e.g.* Art. 31(b), UCMJ, 10 U.S.C. § 831(b) enacted 16 years before this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

[14] The analysis to R.C.M. 705(b)(2)(B) states that "Subsection (2)(B) is based on *United States v. Reynolds*, 2 M.J. 887 (A.C.M.R. 1967); *United States v. Tyson*, 2 M.J. 583 (N.C.M.R. 1976). *See also United States v. Chavez-Rey*, 1 M.J. 34 (C.M.A. 1975); *United States v. Stoltz*, 14 U.S.C.M.A. 61, 34 C.M.R. 241 (1964)." MCM (1995 ED.), App. 21 at A21-39. None of these cases involve pretrial agreements where a noncapital referral was a contingent term of the pretrial agreement.

ment to Art. 18, UCMJ, make clear that when a convening authority has the power to refer a case as noncapital, he must do so unconditionally before a military accused may elect to plead guilty and waive his right to a trial by members. Then, and only then, will a court-martial composed of a military judge alone have jurisdiction to try his case.

At the time Petitioner entered into the pretrial agreement, the members had already assembled[15] and sworn and a capital trial had begun. Had he refused to plead guilty or request trial by military judge alone, his case would have immediately reverted back to a capital trial before the same

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[15] Although not raised below, Petitioner's request for trial before a military judge alone is void, and the court-martial without jurisdiction, because the request was not made "before the court is assembled." *See* Art. 16(1)(b), UCMJ. Both the Court of Appeals and the Navy-Marine Corps Court of Criminal Appeals, however, have held this language is not jurisdictional and that noncompliance is merely a "technical violation" (despite the fact that Art. 16 is part of subchapter IV of the Code entitled "Court-Martial Jurisdiction). *United States v. Morris*, 49 C.M.R. 653 (C.M.A. 1975); *United States v. Jungbluth*, 48 M.J. 953 (N.M.Ct.Crim.App.1998) *pet. rev. denied* 52 M.J. 294 (U.S.C.A.A.F. 1999). Both decisions ignore the plain language of Art. 16, UCMJ, and the historical and jurisdictional significance of the assembly and swearing of court-martial members which thereby empowers them to proceed to try an accused. Winthrop at 162. After assembly a military judge may only excuse an individual member because of physical disability or other good cause. Art. 29, UCMJ, 10 U.S.C. § 829. These opinions also gloss over the plain language of R.C.M. 903(e), MCM (1995 ed.) ("[T]he military judge may *until the beginning of the introduction of evidence on the merits*, as a matter of discretion, approve an untimely request [for trial by military judge alone]....") There is simply no authority for a military judge to excuse an assembled panel of sworn members and substitute himself as the court-martial, particularly when, as in this case, many witnesses have already been heard.

members who were waiting in the wings. Accordingly the case was never *previously* referred to trial as noncapital and the military judge was without jurisdiction to receive his pleas or adjudge a sentence.

Conclusion

The Court of Appeals' decision thwarts the Constitution's separation of powers scheme, the clear intent of Congress, and historic military practice that the authority and discretion of a general courts-martial to lawfully adjudge a sentence, including the death penalty, may not be restricted except by the Constitution, Congress or the President acting pursuant to his legislative appointment under Art. 56, UCMJ.

The Court of Appeals' decision also thwarts the plain language of Art. 18, UCMJ, and clear intent of Congress, that servicemembers charged with capital offenses may not waive their rights to plead not guilty or forgo a trial by members while under the threat of a capital referral or in return for waiving those rights.

Contrary to the opinion of the Court of Appeals, there is no "common sense"[16] exception to the limits Congress has expressly placed on the jurisdiction of courts-martial. *Cf. Dynes v. Hoover*, 61 U.S. 65, 81 (1857). Courts-martial remain ephemeral creatures of statute and cannot obtain jurisdiction over the subject-matter or person unless provided for in the statute, even with the consent of the defendant. *McClaughry v. Deming*, 186 U.S. at 65. This Court had occasion to reaffirm this principle most recently with regard

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[16] *United States v. Fricke*, 53 M.J. at 154.

to the jurisdiction of the Court of Appeals for the Armed Forces. *See Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999).

This year the United States celebrates the 50th anniversary of the enactment of the Uniform Code of Military Justice. 50 M.J. LXI-LXIII. This petition for review provides an auspicious opportunity to reaffirm Congress' precedence in structuring the military justice system and the proper role of the Court of Appeals in that system.

Wherefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2000

Appendix A

United States v. Fricke, 53 M.J. 149 (2000)

UNITED STATES, Appellee

v.

Michael W. FRICKE, Lieutenant Commander
U.S. Navy, Appellant

No. 98-0783

Crim. App. No. 96-1293

United States Court of Appeals for the Armed Forces

Argued December 10, 1999

Decided July 5, 2000

SULLIVAN, J., delivered the opinion of the Court, in which EFFRON, J., and EVERETT, S.J., joined. CRAWFORD, C.J., and GIERKE, J., each filed an opinion concurring in part and dissenting in part.

Counsel

For Appellant: Alison Ruttenberg (argued); Major Dale Anderson, USMC (on brief).

For Appellee: Lieutenant Janice K. O'Grady, JAGC, USNR

(argued); Colonel Kevin M. Sandkuhler, USMC, and Commander Eugene E. Irvin, USN (on brief).

Military Judge: Craig L. Carver

This opinion is subject to editorial correction before publication.

Judge SULLIVAN delivered the opinion of the Court.

Appellant was tried at the Naval Legal Service Office, Norfolk, Virginia, by a general court-martial composed of a military judge sitting alone. Pursuant to his pleas, he was found guilty of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 USC § 918. On August 30, 1994, appellant was sentenced to a dismissal, confinement for life, total forfeitures, a fine of $100,000, and an additional 2 years' confinement if the fine was not paid. On June 11, 1996, the convening authority approved the sentence as adjudged, except, pursuant to a pretrial agreement, he suspended confinement exceeding 30 years and all forfeitures and fines for a period of 10 years. The Court of Criminal Appeals affirmed the findings and sentence on March 10, 1998. 48 MJ 547.

On June 4, 1999, we granted review of the following issues:

> I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT APPELLANT IS NOT ENTITLED TO ADDITIONAL ADMINISTRATIVE TIME CREDIT FOR HAVING BEEN ILLEGALLY CONFINED PRIOR TO TRIAL, AND ADDITIONAL

ADMINISTRATIVE TIME CREDIT FOR HAVING BEEN SUBJECTED TO UNLAWFUL PRETRIAL PUNISHMENT IN VIOLATION OF ARTICLES 13 AND 55, UCMJ.

II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT APPELLANT'S GUILTY PLEA IS NOT VOID IN VIOLATION OF ARTICLE 45, UCMJ, IN THAT APPELLANT PLEADED GUILTY TO A CAPITAL OFFENSE AND THE GENERAL COURT-MARTIAL OF THE KIND SPECIFIED IN 10 USC SECTION 816(1)(B) WAS WITHOUT JURISDICTION TO CONVICT APPELLANT BASED UPON THIS IMPROVIDENT PLEA.

We hold against appellant on Issue II. On Issue I, we remand appellant's case for a *DuBay*[1] hearing on his post-trial claim of unlawful punishment prior to trial. Article 13, UCMJ, 10 USC § 813; see *United States v. Ginn*, 47 MJ 236 (1997); *cf. United States v. Combs*, 47 MJ 330 (1997); see generally *McMillian v. Johnson*, 88 F.3d 1554, 1564-65 (11th Cir. 1996).

(A)

Facts

Appellant was a 38-year old Lieutenant Commander with 17 years of naval service at the time of the offense, and he was assigned to NAS Oceana, Virginia Beach, Virginia. About sunset on the evening of May 13, 1988, appellant's 31-

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[1] *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967).

year-old wife, Roxanne, was shot and killed as she entered her vehicle after shopping at a Farm Fresh supermarket in Virginia Beach. An assailant approached her car, stole her Purse, and shot her twice with a handgun. The crime remained unsolved until October 1993, at which time appellant was arrested.

Lamar Brunson, who had served in the Navy with appellant, informed the Norfolk police that appellant had hired a hit man to kill his wife. The hit man was paid $5,000 shortly after the murder and had been promised a total of $25,000. Appellant paid him an additional $8,000 sometime later. Shortly before his wife's death, appellant had secured a $100,000 term life insurance policy on his wife's life. She already had an existing life insurance policy payable in the amount of $25,000. Appellant was the beneficiary on both policies.

Appellant was kept in pretrial confinement for 326 days. He alleges that during this period, he was housed in a 6-feet by 8-feet cell within the Disciplinary Segregation Unit. According to an affidavit which appellant submitted with his post-trial submissions, he was kept there 23 hours a day, was fed in his cell, and was not allowed to talk to other prisoners. He claims he was required to sit at a small school-like desk from 4:30 a.m. to 10:00 p.m. each day. He was not allowed to sit or lie on his bunk or to sleep. He was only allowed to read the Bible or some other Christian literature.

Appellant initially entered a plea of not guilty to a premeditated murder charge but changed his plea to guilty after the conclusion of the Government's case. At that time, he secured a pretrial agreement from the convening authority. As part of the agreement, the convening authority

promised to withdraw the previous capital referral if appellant successfully completed his providence inquiry to the charged offense. The following exchange between the military judge and trial counsel took place before appellant's plea was entered:

> MJ: At this time, trial counsel, you have an announcement to make regarding the pretrial agreement and the capital referral?
>
> TC: Yes, sir. Sir, I've been authorized by the convening authority that this General Court-Martial's now been referred noncapital. That referral decision is conditioned upon your acceptance of a plea of guilty from the accused to the Charge and Specification, as well as the pretrial agreement in this case.
>
> MJ: Very well. Commander Fricke, because the Government has withdrawn the capital referral at this time, that gives you a different option regarding forum election. . . .

(R. at 1392).

After appellant entered his guilty plea, the following colloquy occurred:

> MJ: And, defense counsel, what advice have you given the accused as to the maximum punishment for the offense of which he's offered to plead guilty?
>
> IMC: Sir, I've advised Lieutenant Commander Fricke that the maximum punishment authorized in this case is: Confinement for life; forfeiture of all pay and

allowances; a fine; loss of all lineal numbers and seniority; and dismissal from the naval service.

MJ: Commander Fricke, you have been correctly advised of the maximum punishment. On your plea of guilty alone, you could receive:

> A dismissal;
> Confinement for life;
> Total forfeiture of all pay and allowances;
> A fine; and
> Loss of all numbers, seniority or lineal position in the Navy.

MJ: Do you understand that?

ACCUSED: Yes, sir.

(R. at 1395) (emphasis added).

After his trial, appellant submitted two affidavits to the appellate court below and made a claim for sentence credit based on illegal pretrial punishments. One was his affidavit, and the other was that of Major Bart Larsen, who was housed in the same facility as appellant during appellant's confinement, but as a sentenced prisoner. Appellant alleged, and Major Larsen corroborated, various conditions endured by appellant during his pretrial confinement and that they were told these conditions were imposed in an effort on the part of Brig authorities to produce a confession from appellant.

The Government, in response to appellant's claims of

illegal pretrial confinement and unlawful pretrial punishment, submitted an affidavit of the Director of Corrections at the Norfolk Naval Brig to the court below. Based solely on these three affidavits, the court below rejected appellant's claims, relying on this Court's decision in *United States v. Ginn*, 47 MJ 236 (1997). It asserted that "[m]ost of the 'facts alleged in [appellant's affidavits] . . . would not result in relief even if any factual dispute were resolved in appellant's favor[.]'" It also said, "Under these circumstances [two affidavits from appellant 3 years apart] 'the appellate filings and the record as a whole "compellingly demonstrate" the improbability' of the remainder of appellant's affidavits." *United States v. Fricke*, 48 MJ at 550, quoting *United States v. Ginn*, 47 MJ at 248. Judge Leo dissented, reasoning that "there is no basis in the appellate filings or the record as a whole to support the majority's finding that the improbability of appellant's factual assertions has been 'compellingly demonstrated' on this claim of pretrial punishment." Id. at 551.

Appellant's affidavit, as noted above, recounted his belief as to why he was subjected to these "horrific and onerous conditions" of pretrial confinement. He stated in his affidavit of June 1995:

> *The Government's intent was clear and summed up by Senior Chief Jacobs, the senior counselor assigned to the Naval Brig and the counselor assigned to me during my confinement there. Senior Chief Jacobs told me on a number of occasions that the Government would keep me 'locked down until they broke' me.* His comments to me are documented in the enclosed statement of Major Bart Larsen, an Air Force Officer who was confined a portion of the time in the Brig while I was there. The Senior

> Chief was completing his second, three-year tour of duty at the Naval Brig and was completing his Bachelors Degree in Criminology. He was no rookie to the manner in which the Government operates and spoke from extensive experience and training.
>
> * * *
>
> As previously mentioned, the Government's intent of the manner in which I was confined was aptly stated by Senior Chief Jacobs, the senior counselor at the Brig. *He stated on many occasions it was common for the military to keep a pre-trial inmate locked down in order to break them and get them to confess.*

(Emphasis added.)

Appellant also submitted an affidavit dated April 1995 from another prisoner, Major Bart Larsen. He described the conditions of confinement similar to appellant's affidavit and he further stated:

> We were housed in adjacent cells even though I was an adjudged prisoner and LCDR Fricke was in pretrial confinement. We had the same counselor, Senior Chief Jacobs, the senior counselor at the Brig, who often talked to us together. Senior Chief Jacobs was on his second, three- year tour of duty at the Norfolk Naval Brig. *On several occasions I heard him state that many times the military would hold personnel in arduous pretrial confinement for a long period of time to 'break them' into confessing. He also said that LCDR Fricke "held the brig record for being in the block longer than any previous prisoner.*"

(Emphasis added.)

The Government, in response, submitted an affidavit from the prison administrator of the Naval Brig where appellant was held in pretrial confinement. It stated:

> 1. My name is Ronnie C. Askew. I am the Director of Corrections at Naval Brig, Norfolk, Virginia. I have been assigned at this facility since April 1980 and was serving in this position during the pretrial confinement of LCDR Fricke [sic] have personal knowledge of the conditions of his confinement. The following statements are based upon current memory.
>
> 2. All individuals confined are first assigned to a one person cell measuring approximately 6 feet wide, 8 feet deep, and 10 feet high for a period of observation and custody and security classification. They are not required to stay in this cell at all times and are removed to visit their counselor, use the phone, purchase health and comfort items, go to the barber shop and medical if needed. Due to the requirement to house officers separate to the extent possible from enlisted prisoners, LCDR Fricke was assigned to either cell block A or B during his confinement period. During the time frame that LCDR Fricke was confined at this facility, officers were housed in the cell block area in order to maintain separation from enlisted prisoners. All cells at this facility are designed the same, no cell or cell block is designated a specific status. The difference between special quarters and disciplinary segregation is based on what items the prisoner is allowed to have in his cell. Disciplinary segregation also results in the loss of all privileges.

LCDR Fricke was never placed in disciplinary segregation and was afforded all privileges possible. In order for officer prisoners to participate in programs with enlisted members the officer is required to submit a request in writing and state that he waives his right of separation from enlisted. To my knowledge, LCDR Fricke never made such a request nor did he waive his right of separation. I have attached copies of the daily routine for officers as contained in NAVBRIGNORVAINST 5000.1B (revised Oct 96 but in effect during LCDR Fricke's confinement period), if LCDR Fricke did not watch TV or read other than the Bible, it must have been by personal choice.

3. In regards to the use of restraining devices, LCDR Fricke was not escorted outside the Brig compound by Brig staff. The use of restraints would have been a decision of the Naval Base Police Department who provided escorts.

4. In order to prevent injury to the prisoner or others, chief petty officer and officer prisoners are not allowed to wear ribbons or collar devices at any time inside the Brig.

(Emphasis added.)

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(B)

Validity of Guilty Plea

(Granted Issue II)

The first issue we will address in this case is Assigned Issue II. Appellant asks that we set aside his guilty plea to premeditated murder and his noncapital sentence for two reasons. First, he asserts that his plea of guilty in a case referred as capital was "void" under Article 45(b), UCMJ, 10 USC § 845(b).[2] Second, he asserts that the military judge had no jurisdiction to accept a plea of guilty to this offense in a case referred as capital. Article 18, UCMJ, 10 USC § 818.[3] We disagree.

The factual premise of appellant's argument is that his case was referred capital at the time his plea of guilty to premeditated murder was proferred and accepted by the military judge. In his final brief, he recognizes that the convening authority had agreed to withdraw the case as capital, if his plea of guilty was accepted by the military judge. Moreover, he recognizes that the military judge did

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[2] Article 45, Uniform Code of Military Justice, states:

> (b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

[3] Article 18, UCMJ, states:

> ... However, a general court-martial of the kind specified in section 816(1)(B) of this title (Article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

indeed accept his guilty plea. Nevertheless, he asserts:

> However, there is nothing in the record to show that the convening authority actually withdrew the referral as a capital case and re-referred it as a noncapital case. In the absence in the record of any paperwork by the convening authority referring the case as noncapital, the case remained a capital case throughout all the proceedings, including the guilty plea and sentencing phases. Therefore, at all times during the trial until sentence was announced, the appellant faced the death penalty, and in fact, a death qualified panel remained on standby to try him for his life until the start of the pre-sentencing hearing.

Final Brief at 34-35.

We are not persuaded by appellant's statutory arguments for several reasons. First, he has cited no controlling authority for his assertion that "paperwork by the convening authority referring the case as noncapital" was required. *See United States v. King*, 28 MJ 397, 399 (CMA 1989); RCM 601(e)(1), Discussion, Manual for Courts-Martial, United States (1994 ed.) (nonbinding comments of drafters of Manual generally suggesting "[a]ny special instructions must be stated in the referral indorsement"); cf. RCM 103(2) (no express requirement that noncapital referral be stated in instruction that is written). Second, his argument ignores the fact that the military judge, without objection by the parties in this case, acknowledged the noncapital referral of his case on the record prior to the acceptance of his guilty plea. (R. 1392). *See United States v. Clark*, 35 MJ 432, 433 n.1 (CMA 1992); cf. *United States v. McFarlane*, 8 USCMA 96, 23 CMR 320 (1957). Finally, the failure to reduce the re-

referral to writing (not the re-referral itself) was technical in nature and did not deprive appellant of the essential protections of the above-noted statutes. See *United States v. Stinson*, 34 MJ 233, 238 (CMA 1992), citing *United States v. Gebhart*, 34 MJ 189 (CMA 1992), and *United States v. Jette*, 25 MJ 16 (CMA 1987). Clearly, our case law has recognized that common sense must prevail in these circumstances. *See United States v. Yates*, 28 MJ 60, 63 (CMA 1989). Therefore, appellant loses on Issue II.

(C)

Pretrial Punishment

(Granted Issue I)

The other issue raised in this case concerns appellant's post-trial claim that he was unlawfully placed in pretrial confinement and unlawfully punished while in that status. His initial contention is that, in light of his exemplary service performance, he should not have been confined solely on the basis of an allegation of a 5-year-old murder. *See* RCM 305(h)(2)(B)(iii).[4] His second contention is that prison authorities improperly subjected him to excessively arduous and inhumane conditions of pretrial confinement, not placed on other pretrial confinees, in order to coerce or break him into confessing. He requests "credit of five-for-one days for the 326 days that he spent in pretrial confinement." Final Brief at 13.

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[4] We find no merit to this claim. *See generally United States v. Gaither*, 45 MJ 349, 352 (1996) (abuse-of-discretion standard).

Article 13, UCMJ, 10 USC § 813, provides:

> § 813. Art. 13. Punishment prohibited before trial. No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Absent affirmative waiver of this issue at trial, we have considered claims under this codal provision raised for the first time on appeal. *United States v. Huffman*, 40 MJ 225, 227 (CMA 1994); *see United States v. Combs*, 47 MJ 330, 333 (1997).[5]

In *United States v. McCarthy*, 47 MJ 162, 165 (1997), this Court recognized that Article 13, UCMJ, prohibits both the purposeful imposition of punishment on a military accused prior to court-martial and pretrial confinement conditions which are more rigorous than the circumstances required to ensure an accused's presence. Moreover, this Court also recognized in *United States v. Miller*, 46 MJ 248, 250 (1997), that the purposeful denial of the constitutional rights of a servicemember while in pretrial confinement might constitute illegal pretrial punishment permitting sentence

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[5] In view of appellant's unrebutted assertion that no motion for sentence credit based on unlawful pretrial punishment was made at his trial on advice of defense counsel that it could be raised on appeal, we do not find a knowing and intelligent waiver of this issue. *See United States v. Combs*, 47 MJ 331, 333-34 (1997).

credit. Finally, we have held that the failure to object to a military magistrate or chain of command is strong evidence that unlawful pretrial punishment did not occur.[6] *See United States v. Huffman, supra* at 227.

Our first inquiry under these principles is whether appellant has raised a legal claim which, if true, would entitle him to relief. *See United States v. Ginn*, 47 MJ at 244. He avers, inter alia, that for 326 days he was locked in his cell, 23 hours per day, 15 1/2 of which he was required to sit at a small wooden desk or stand nearby if he fell asleep at the desk. A majority of the court below held that the facts alleged in appellant's affidavits would not result in relief or were compellingly demonstrated to be improbable. 48 MJ at 550. We disagree.

The conditions alleged above are not "de minimis" impositions on a pretrial detainee for which the law is not concerned. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.21 (1979), quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *see also McClanahan v. City of Moberly*, 35 F.Supp.2d 744, 745-46 (E.D. Mo. 1998) (and cases cited therein). Instead, they are "genuine privations and hardship over an extended period of time," which "might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment." *Bell v. Wolfish*, 441 U.S. at 542; *see also Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Pippins v. Adams County Jail*, 851 F.Supp. 1228, 1232 (C.D. Ill. 1994). In fact, as pointed out by the dissenting judge below, conditions similar to appellant's

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[6] Appellant's affidavit dated June 1995 clearly indicates that he repeatedly protested his treatment to Senior Chief Jacobs, the senior counselor at the Brig.

alleged pretrial confinement have previously been considered "far more onerous than would be required to assure [appellant's] presence." 47 MJ at 551 (Leo, J., dissenting), quoting *United States v. Palmiter*, 20 MJ 90, 99 (Everett, C.J., concurring in the result). Finally, appellant's particular allegations, corroborated by a second prisoner with direct knowledge of the conditions of his confinement, were opposed by post-trial assertions of a prison administrator as to general prison practices. *Cf. United States v. Combs*, *supra* (essentially unrebutted case).

In addition, coercing a confession is not a legitimate governmental objective. See *Culombe v. Connecticut*, 367 U.S. 568, 584 (1961) ("neither the body nor mind of an accused may be twisted until he breaks") (opinion of Frankfurter, J.); Bell v. Wolfish, 441 U.S. at 539 (noting that "if a restriction or condition is not reasonably related to a legitimate [government] goal . . . a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees"); *see generally Block v. Rutherford*, 468 U.S. 576, 583-84 (1984). Here, appellant submitted a post-trial affidavit that the confinement authorities' intent in imposing a continuous lockdown on him as a pretrial detainee was to coerce his confession in violation of his constitutional rights. See *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996). The prison official's affidavit does not particularly deny this charge but at least impliedly disputes such an intent on the part of prison authorities. *Cf. Rapier v. Harris*, 172 F.3d 999, 1002-03 (7th Cir. 1999) (placing pretrial detainee in solitary confinement for 270 days expressly based on objective of maintaining safety of other inmates and jail personnel found to be legitimate government purpose). In these circumstances, a factual decision on the

intent of the detention officials is also necessary to decide whether appellant was subjected to illegal pretrial punishment. *See United States v. Ginn*, supra at 245.

The appropriate resolution of this unlawful pretrial punishment claim is to remand this case for a *DuBay* hearing. *Id.; see McMillian v. Johnson*, 88 F.3d at 1564-65. There, the record can be fully developed as to the conditions actually imposed on appellant during his pretrial confinement and the intent of detention officials in imposing those conditions. *See United States v. Fricke*, 48 MJ at 550-51 (Leo, J., dissenting); *Ginn*, 47 MJ 236; *Huffman*, 40 MJ 225; *see also Bell v. Wolfish*, 441 U.S. at 537-39 (for test to determine whether pretrial confinement constitutes unconstitutional punishment).

(D)

Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed as to findings but set aside as to sentence. The record of trial is returned to the Judge Advocate General of the Navy for further proceedings in accordance with this opinion and *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967). After such proceedings are concluded, the record of trial, along with the military judge's findings of fact and conclusions of law, will be returned to the Court of Criminal Appeals for further review under Article 66(c), Uniform Code of Military Justice, 10 USC § 866(c)(1994). Thereafter, Article 67(a), UCMJ, 10 USC § 867(a)(1994), will apply.

CRAWFORD, Chief Judge (concurring in part and dissenting in part):

I agree with the Court's disposition of Issue II. As to Issue I, consistent with my views in *United States v. Huffman,* 40 MJ 225, 228 (CMA 1994)(Crawford, J., dissenting in part and concurring in the result), and *United States v. Combs*, 47 MJ 330, 334 (1997)(Crawford, J., dissenting), I would hold that appellant has waived his claim concerning unlawful pretrial punishment by failing to raise the matter before either the magistrate or the military judge.

Even though I would dispose of Issue I by applying waiver, I find that appellant's failure to complain is "strong evidence" that he was not punished in violation of Article 13. *Huffman*, supra at 227; *see United States v. James*, 28 MJ 214 (CMA 1989); *United States v. Palmiter*, 20 MJ 90, 97 (CMA 1985).

Appellant spent 326 days in pretrial confinement. He complained for the first time in June 1995, nearly 1 year after his court-martial, that he was required to sit at a small wooden desk within his 6-by-8-foot cell for 15½ hours per day, or stand "for hours" should he fall asleep at that desk. He was not allowed to talk with other prisoners. He was only permitted to read the Bible or Christian literature by the light of one 40-watt light bulb, but was prohibited from attending church services and Bible studies. He was denied the amenities of sentenced prisoners: access to recreational facilities and equipment; newspapers; television; radio; assistance organizations; and rehabilitation programs.

The majority is correct by concluding that if these allegations are true, appellant would be entitled to relief.

However, unlike the majority, I find that the record, logic, and common sense together "compellingly demonstrate" the improbability of the facts alleged by appellant. *Cf. United States v. Ginn*, 47 MJ 236, 248 (1997).

First, appellant was a 38-year-old Lieutenant Commander who extensively litigated the necessity for his pretrial confinement. Yet, if one is to believe him, appellant failed to mention these "horrific and onerous" pretrial conditions either to the magistrate or the military judge. Second, the conditions which appellant claims he had to endure are strikingly similar to those found to have existed at the Charleston Navy Brig, and which we found to be a violation of Article 13, in *United States v. Palmiter*, supra. Either the Department of the Navy has decided to flout the authority of this Court and reinstate pretrial confinement conditions that we condemned, or appellant's recitation ~~of~~ his pretrial confinement conditions is other than reality. I suggest the latter. Accordingly, I would affirm the Court of Criminal Appeals decision.

GIERKE, Judge (concurring in part and dissenting in part):

I agree with the majority's resolution of Issue II. In my view, Issue I was waived. *United States v. Huffman*, 40 MJ 225, 228-29 (CMA 1994).

This is one more case demonstrating the wisdom of the waiver rule in RCM 905(e). Appellant is not an inexperienced sailor. As the majority notes, at the time of the alleged offenses in 1988, he was 38-year-old commissioned officer with 17 years of service. By the time he was tried in 1994, he was in his 40s and retirement eligible. He did not find his conditions of pretrial confinement sufficiently

onerous to challenge them at trial. In my view, the result of the majority opinion is to allow sandbagging by this appellant, and to leave the court below with a Hobson's choice of investigating a stale, 6-year-old allegation or giving appellant a windfall.

As a final note, I believe that Article 13 issues in future guilty-plea cases could be resolved easily in a manner consistent with both the majority and minority opinions in *Huffman*, if military judges would conclude their plea inquiry with a question whether there is any claim of unlawful pretrial punishment.

Appendix B

***United States v. Fricke*, 48 M.J. 547 (1998)**

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

E.D. CLARK **LARRY D. WYNNE** **R.B. LEO**

UNITED STATES

v.

Michael W. FRICKE, 265-27-0767
Lieutenant Commander (O-4), U.S. Navy

PUBLISH

NMCM 96 01293 Decided 10 March 1998

Sentence adjudged 30 August 1994. Military Judge: C. L. Carver. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Norfolk, VA.

LOUIS B. FONT, Civilian Defense Counsel
LT R.A. RICE Jr., JAGC, USNR, Appellate Defense Counsel
LT E. RUBIELLA, JAGC, USNR, Appellate Defense Counsel

LCDR CHRISTIAN L. REISMEIER, JAGC, USN,
Appellate Government Counsel

WYNNE, Judge:

We have examined the record of trial, the assignments of error,[1] and the Government's response. The findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant

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[1] I. APPELLANT'S GUILTY PLEA IS VOID IN VIOLATION OF ARTICLE 45, UCMJ, AND R.C.M. 910 IN THAT APPELLANT PLEADED GUILTY TO A CAPITAL OFFENSE.

II. APPELLANT'S TRIAL LACKED JURISDICTION BECAUSE APPELLANT WAS TRIED BEFORE A JUDGE ALONE IN A CASE FOR WHICH THE DEATH PENALTY COULD HAVE BEEN ADJUDGED.

III. APPELLANT IS ENTITLED TO ADDITIONAL ADMINISTRATIVE TIME CREDIT FOR HAVING BEEN ILLEGALLY CONFINED PRIOR TO TRIAL, AND ADDITIONAL ADMINISTRATIVE TIME CREDIT FOR HAVING BEEN SUBJECTED TO INHUMANE PRETRIAL PRISON CONDITIONS FOR 326 DAYS.

IV. THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS WIRETRAP EVIDENCE. (Footnote omitted.)

V. ASSISTANT TRIAL COUNSEL ENGAGED IN MISCONDUCT AND SHOULD HAVE BEEN DISQUALIFIED BY THE MILITARY JUDGE. (Footnote omitted.)

VI. THE CONVENING AUTHORITY ILLEGALLY REFERRED THE CASE TO TRIAL ON THE BASIS OF INFORMATION WHICH HE WAS PROVIDED OUTSIDE THE RECORD OF THE ARTICLE 32, UCMJ, INVESTIGATION. (Footnote omitted.)

VII. APPELLANT'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE. (Footnote omitted.)

was committed. We affirm the findings and sentence; our reasoning is set out below.

A Summary of the Case and the Appellant's Claims

In accordance with his pleas, the appellant was convicted of the premeditated murder of his wife in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (1994) [hereinafter UCMJ]. The appellant entered his pleas pursuant to a pretrial agreement and was sentenced by the military judge under the provisions of that agreement. *See United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994).

The appellant's case was originally referred to trial without special instructions precluding the court from adjudging the death penalty. *See* RULES FOR COURTS-MARTIAL 103, 601, 1003, and 1004, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter R.C.M.]. In the pretrial agreement the convening authority agreed to "withdraw the capital referral" and suspend all confinement in excess of 30 years. In return, the appellant agreed to plead guilty and be sentenced by the military judge. Appellate Exhibits CCXII and CCXIII.[2]

The appellant now contends that his plea of guilty

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[2] It might have been better, semantically, if the pretrial agreement had required the convening authority to forward "proper instructions" providing that a sentence of death could not be adjudged rather than agreeing to withdraw the capital referral. *See* R.C.M. 601(e)(1). We are, however, sympathetic to the parties' drafting burden. The confusion may be born from the inconsistent use of "[]capital case" and cases in which "death [] may be adjudged". For example, *compare* Art. 18, UCMJ, 10 U.S.C. §818, *and* R.C.M. 201, *with* Art. 45, UCMJ, 10 U.S.C. §845, *and* R.C.M. 1004. We cut this Gordian knot by deciding the case on the merits of the agreement.

and the subsequent trial by military judge alone violated Articles 18 and 45(b), UCMJ, 10 U.S.C. §§ 818 and 845(b).

The appellant also says that even if his pleas were valid he was punished prior to trial in violation of Article 13, UCMJ, 10 U.S.C. § 813, and that he ought to receive appropriate credit against his sentence. *See* Art. 13, UCMJ, 10 U.S.C. § 813; *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). We consider this claim at some length, but the appellant raises several spurious claims which we reject summarily as having no basis in law or fact.

The Legality of Appellant's Pleas of Guilty and his Trial by Military Judge Alone, Assignments of Error I and II

Articles 18 and 45(b) of the Uniform Code of Military Justice, 10 U.S.C. §§ 818 and 845(b), taken in tandem, require a full trial by members before the death penalty may be adjudged. The accused can, on the other hand, plead guilty to a lesser-included offense even when death may be adjudged for the greater offense charged. H.R. 2498, 81st Cong. (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1056-57 (1950); S. REP. NO. 1601 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505.

A plea of guilty and the imposition of sentence by a military judge are not precluded by Article 18 or 45(b), UCMJ, 10 U.S.C. § 818 or 845(b), as long as a sentence of death may not be adjudged based on that plea and those proceedings. *Compare United States v. Wheeler*, 10 C.M.A. 646, 28 C.M.R. 212 (1959)(plea to premeditated murder valid if death may not be adjudged), *with United States v. Dock*, 28 M.J. 117 (C.M.A. 1989)(pleas invalid and death

adjudged).

In this case no sentence of death could be adjudged, but the appellant asserts that his case is different because his pleas of guilty were entered near the end of the Government's case-in-chief and under the specter of the death penalty.

"[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Brady v. United States*, 397 U.S. 742, 755 (1970). As to the unusual timing, the appellant's "pleas of guilty ... [were] no more improperly compelled than is the decision . . . at trial that he must take the stand or face certain conviction." *Id.* at 750.

The accused chooses if and then when he will attempt to enter a plea of guilty, but after conviction, absent unlawful coercion, the accused is bound by his plea. The appellant does not allege that his statements are untrue. The appellant does not claim that the facts he admitted fail to constitute the crime of premeditated murder. We will not set aside his valid plea of guilty. *See generally United States v. Vega*, 39 M.J. 79, 80-81 (C.M.A. 1994)(citing *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Logan*, 22 C.M.A. 349, 351, 47 C.M.R. 1, 3 (1973).

The Article 13, Pretrial-Punishment Claim

The appellant asserts that he was punished prior to trial in violation of Article 13, UCMJ, 10 U.S.C. § 813, and that his trial defense counsel "failed to litigate [the issue] at trial." Assignment of Errors and Brief on Behalf of Appellant at 29. The paradigm created in *United States v. Ginn*, 47 M.J. 236 (1997), is applicable to appellant's pretrial-punishment claim.

The appellant was a field-grade officer lawfully confined prior to trial for the most heinous of crimes. The conditions of appellant's confinement were no doubt arduous, but extensive restrictions on the accused's personal freedom are inherent in the rational imposition of confinement separate from sentenced prisoners. *See generally United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). Most of the "facts alleged in [appellant's affidavits] . . . would not result in relief even if any factual dispute were resolved in appellant's favor[.]" *Ginn*, 47 M.J. at 248.

The appellant made his first complaint regarding the conditions of his confinement nearly a year after his trial. Petition for Clemency of 12 June 1995. The affidavit the appellant submitted to this court, 3 years later, describes in much greater detail the conditions of his pretrial confinement. Under these circumstances "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability" of the remainder of the appellant's affidavits. *Ginn*, 47 M.J. at 248.

The Appellant's Other Claims

We summarily find that the appellant's remaining claims are without merit:

> The appellant personally and affirmatively waived any issue regarding the admissibility of evidence. Record at 1399. Assignment of Error IV has no merit.
>
> The trial defense team objected to testimony regarding the photographic identification of someone other than the accused. This out-of-court identification was never offered or admitted. Record at 591. Assignment of Error

V has no merit.

The convening authority properly referred this case to trial. R.C.M. 601. Assignment of Error VI has no merit.

The appellant's "claim of ineffective representation contradicts a matter that is within the record of a guilty plea" and is without merit. *Ginn*, 47 M.J. at 248. Assignment of Error VII has no merit.

Accordingly, the findings of guilty and the sentence are affirmed.

LARRY D. WYNNE

Senior Judge CLARK concurs.

E.D. CLARK

LEO, Judge (dissenting):

I dissent from the majority's cursory dismissal of the appellant's claim of pretrial punishment. I believe that the appellant has put forth a sufficient claim to warrant a remand of this issue for a *DuBay* proceeding.

While the appellant's failure to raise a claim of pretrial punishment at the trial level does not waive the issue, it is "strong evidence that [he was] not being punished in violation of Article 13[, UCMJ, 10 U.S.C. § 813]." *Huffman*,

40 M.J. at 227. The untimeliness of the claim, therefore, is but one factor--albeit a significant factor--which must be considered with all other evidence before this court.

Unlike *Huffman*, however, there is *no evidence* in this record to assist us in determining whether the challenged conditions were intended as punishment or were "reasonably related to a legitimate goal." *Id.* at 227 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). What we have, instead, are conflicting post-trial affidavits submitted by the appellant and the Government.

Our superior court recently held that "Article 66(c)[, UCMJ, 10 U.S.C. § 866(c)] does not authorize a Court of Criminal Appeals to decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *Ginn*, 47 M.J. at 243.

Accordingly, we must initially look to the appellant's supporting affidavits to determine whether they assert "specific facts" or merely "speculative or conclusory observations." If the affidavits are factually adequate on their face, we then look to the appellate filings and the record as a whole to determine if they "compellingly demonstrate 'the improbability of those facts'" such that we may discount the appellant's factual assertions and decide the legal issue without remand to the trial level for a *DuBay* proceeding. *Id.* at 248.

In this instance, the appellant's affidavits are compelling in their specificity regarding the conditions of his pretrial confinement. He alleges that he was kept in a lockdown status with confined prisoners who were in

disciplinary segregation for 326 days, wherein he was (1) confined to a small 6x8 cell for 23 hours a day, (2) required to sit at a small school-like desk from 0430 to 2200 hours each day, (3) allowed very limited access to reading material, and (4) was not allowed to participate in any prison programs. He additionally claims that his brig counselor told him that he was kept in these conditions to break him and make him confess. The appellant's assertions are substantially corroborated by the supporting affidavit of Major L, a fellow-officer who was incarcerated in the adjoining cell during a portion of the appellant's pretrial confinement.

The appellant, in his affidavits, also attempts to rebut the untimeliness of his claim by asserting that he wanted to raise the issue at trial, but instead was told by the members of his trial defense team that he should raise it on appeal. Attachment A to LCDR Fricke affidavit of 22 July 1997, at 1, Motion to Attach Documents of 22 August 1997. We have nothing from either of the trial defense counsel confirming or denying the appellant's assertion. However, if true, it could significantly lessen the evidentiary value of not raising this issue at trial.

The terms and conditions of confinement will not be dictated by an accused, but rather "should always be left up to the correctional facility commanders and the respective services." *United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985). Nonetheless, Chief Judge Everett, in his concurrence, opined that some of the same conditions alleged by the appellant were "far more onerous than would be required to assure the detainee's presence and so they violated Article 13." *Id.* at 99.

The Government's sole response is an affidavit from the Director of Corrections at Naval Brig Norfolk, which attempts to rebut the appellant's claims with generalities and conclusory observations like "LCDR Fricke ... was afforded all privileges possible" and "if LCDR Fricke did not watch TV or read other than the Bible, it must have been by personal choice." The off-handed manner of this response is not what I expect to see from the Government in addressing an important issue before this court. It only underscores the need to remand this case for a post-trial evidentiary hearing.

In summary, there is no basis in the appellate filings or the record as a whole to support the majority's finding that the improbability of the appellant's factual assertions has been "compellingly demonstrated" on this claim of pretrial punishment. Moreover, if the factual assertions of the appellant were borne out in his favor at a *Dubay* proceeding, I believe he would be entitled to some meaningful relief.

R.B. LEO